

STATE OF MICHIGAN
COURT OF APPEALS

FRIEDA WILLIAMS,

Plaintiff-Appellant,

v

CENTRAL MICHIGAN UNIVERSITY,

Defendant-Appellee.

UNPUBLISHED

April 8, 2008

No. 276445

Court of Claims

LC No. 06-000124-MZ

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiff, Frieda Williams, appeals as of right from the grant of summary disposition in favor of defendant, Central Michigan University (“CMU”), pursuant to MCR 2.116(C)(7). We affirm.

This action arises from a slip and fall that occurred at CMU’s football stadium. In early August 2005, plaintiff’s daughter, a high school band member at Carmen Ainsworth High School, attended and participated in a band camp sponsored by the High School and held at CMU. While watching a performance of the high school band at Kelly Shorts Stadium, CMU’S outdoor football stadium, plaintiff left her seat to use the rest room. While walking up steps to an exit she stepped on a crack, which caused her to fall. Plaintiff incurred injuries to her right hand and wrist.

Plaintiff filed the current action in September 2006 with the Court of Claims. This appeal was initiated before discovery was completed. In December 2006, CMU filed motions for summary disposition asserting the stadium was not a public building and denying the applicability of the proprietary function exception to governmental immunity. Following a hearing on the motion for summary disposition, the trial court initially took the matter under advisement, subsequently issuing an opinion and order on February 2, 2007, granting defendant’s motion. Specifically, the trial court ruled that CMU was “immune from tort liability pursuant to MCL 691.1407(1)” based on its finding that “the stadium is not a ‘public building’” and that CMU “was not engaged in the high school band camp for purposes of proprietary gain or profit.”

Governmental immunity comprises a question of law that is reviewed by this Court de novo. *Briggs v Oakland Co*, 276 Mich App 369, 371; 742 NW2d 136 (2007). In addition, we review a trial court’s determination on a motion for summary disposition de novo. *Dressel v*

Ameribank, 468 Mich 557, 561; 664 NW2d 151 (2003). Specifically, when reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), “all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties.” *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005) (citation omitted). In addition, if there are no facts in dispute, “or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law.” *Id.*

Plaintiff first contends the trial court erred in its determination that CMU’s stadium is not a public building. MCL 691.1406 delineates the public building exception to governmental immunity, providing, in relevant part:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place.

In order to invoke this exception, a litigant must demonstrate:

(1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. [*Pierce, supra* at 177-178, quoting *Fane v Detroit Library Comm*, 465 Mich 68, 75; 631 NW2d 678 (2001) (internal quotation marks and citation omitted).]

Notably, MCL 691.1406 fails to define the term “building.” As a result, courts may look to dictionary definitions in order to ascertain the ordinary meaning of undefined statutory terms. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In *Pierce, supra* at 178, this Court cited to *Ali v Detroit*, 218 Mich App 581, 584-585; 554 NW2d 384 (1996), stating:

“Building” is defined as a “relatively permanent, essentially boxlike construction having a roof and used for any of a wide variety of activities, as living, entertaining, or manufacturing,” *The Random House College Dictionary: Revised Edition* (1984), and a “structure designed for habitation, shelter, storage, trade, manufacturing, religion, business, education and the like. A structure or edifice

enclosing a space within its walls, and usually, but not necessarily[,] covered with a roof.” Black’s Law Dictionary (5th ed).

Plaintiff argues that whether CMU’s stadium constituted a building was a question of fact and that further discovery on this issue should have been permitted. Specifically, plaintiff contends that the stadium, given the existence of seating and internal facilities for concessions, restrooms, first aid and other functions constituted a sufficient structure to be deemed a building for the imposition of the public building exception. Further, although the trial court did not rule on whether the building was open to the public when plaintiff’s injury occurred, she contends that payment for her daughter’s attendance at the band camp permitted her admission to the stadium resulting in the facility being used for a public purpose.

CMU responds that its stadium “is not comparable to those structures which have been found by this Court to be ‘buildings’” and describes the structure as merely a “horseshoe-shaped depression in the ground.” Consequently, because it was not enclosed on all sides and did not have a roof, CMU asserts the stadium does not meet the definitional requirement of a “building” for imposition of MCL 691.1406.

Contrary to plaintiff’s assertion, the trial court ruled both that the stadium was “not a ‘building’ as defined . . . in *Pierce*” and that it was not a “public building” thereby precluding application of the public building exception to CMU’s claim of governmental immunity. Notably, we find the stadium does not meet the general criteria to be defined as a “building” based on its open construction. In addition, the stadium cannot be construed as a public building as access to the structure was limited. In *Maskery v U of M Bd of Regents*, 468 Mich 609, 618-619; 664 NW2d 165 (2003), our Supreme Court provided guidance for determination of whether a building is public, stating, in relevant part:

To determine whether a building is open for use by members of the public, the nature of the building and its use must be evaluated. The government, of course, controls the use that will be made of its buildings. If those persons who are qualified on the basis of some individualized, limiting criteria of the government’s creation, the building is not open to the public. This test arises from the plain statutory language. If access to a building is limited in the manner we have described, members of the public may not freely enter, and the building is not open for use by members of the public.

The Court went further, clarifying:

This test focuses on whether the government intends to limit the public’s access to the building—a breach of the rules limiting entry would not render the building open to the public. Where a person who is not qualified for entry nonetheless gains access, the government remains entitled to immunity. [*Id.* at 619.]

Specifically, the Court noted:

[A] university athletic facility may be open to the public during a sporting event, but closed to the public at other times. Because the statutory language limits the exception to periods *when* the building is open for use by members of the public,

accidents that occur when the building is closed to the public do not fall within the confines of the exception, and the government is entitled to immunity. [*Id.* (emphasis in original).]

Based on the criteria elucidated in *Maskery*, CMU is not deprived of its governmental immunity as plaintiff has failed to demonstrate that the stadium was open to the public at the time of her accident. CMU presented an affidavit averring that it was not conducting the band camp attended by plaintiff's daughter and that access to the facility was restricted to individuals participating in the camp program, which was limited to the high school staff conducting the camp and the individual band members. Plaintiff's presence at the stadium was during a time when the facility was not open to the public and there is no evidence or suggestion that invitations or permission had been extended to parents of band members, such as plaintiff, to attend the practices. As a result, the trial court's grant of summary disposition and rejection of the applicability of the public building exception was appropriate under the circumstances.

Plaintiff next contends the trial court erred in ruling that the proprietary function exception to governmental immunity was inapplicable to this case. Plaintiff argues that the band camp attended by her daughter constituted a propriety function and that, had discovery been more fully completed before the grant of summary disposition, she would have been successful in demonstrating the financial benefit by CMU. We note that plaintiff fails to cite any legal authority in support of her argument. "An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003).

The propriety function exception contained in MCL 691.1413, provides in relevant part:

The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.

To be considered a proprietary function, an activity: (1) must be conducted primarily for the purpose of producing a pecuniary profit; and (2) it cannot be normally supported by taxes and fees." *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004) (citation omitted).

Contrary to plaintiff's assertion, CMU has come forward with an affidavit demonstrating that it did not run the band camp for a monetary benefit or gain. CMU stated that the band camp was run by the high school, which maintained a contract only for access to CMU's facilities and reimbursement of costs incurred for their use. The primary purposes cited by CMU in allowing use of its facilities were (1) to provide the high school band students an opportunity and the resources to further their music education and skills consistent with the University's educational mission and (2) to serve as an indirect mechanism to encourage possible future college students to consider attendance at CMU. Although CMU charged the high school fees for the use of its services and facilities, the monies charged were structured merely to cover costs and not to produce a profit. CMU acknowledged that if any fees incurred exceeded direct expenses and

overhead, the monies realized were minimal and placed in its general fund, which is used to pay operating expenses and capital improvements. Consequently, the trial court's determination that CMU "was not engaged in the high school band camp for purposes of proprietary gain or profit" was correct and justified the grant of summary disposition.

Finally, plaintiff contends the trial court erred in granting summary disposition before the completion of discovery. Plaintiff filed written discovery requests in December 2006. Concurrent with the filing of its motions for summary disposition, CMU filed a motion seeking extension of the time limits for responding to plaintiff's discovery requests until after the summary disposition motions had been heard. CMU contests plaintiff's assertion that it sought to withdraw its motion to extend time for filing of the discovery responses, indicating that the motion was not ruled on because it was scheduled for a hearing date after the trial court granted summary disposition. In addition, CMU asserts the interrogatories submitted were merely "boilerplate" slip and fall requests and did not address CMU's governmental immunity defenses.

"Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). However, "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). "Mere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition." *Davis v City of Detroit*, 269 Mich App 376, 380; 711 NW2d 462 (2005) (citation omitted). On appeal, plaintiff merely contends the possibility of factual development that could provide a basis for her recovery. However, plaintiff fails to specify any assertion or indication of what the alleged basis for recovery might encompass. As a result, plaintiff fails to satisfy even the minimal independent evidentiary support required to support her contention that the grant of summary disposition was premature. Consequently, the trial court's ruling that CMU is immune from suit was correct.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto